



## COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 14-1

February 25, 2015

Petition of CoxCom, Inc. d/b/a Cox Communications to establish and adjust the basic service tier programming, equipment, and installation rates for the Town of Holland

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### HEARING OFFICER RULING

#### I. INTRODUCTION

In this Ruling, the Department of Telecommunications and Cable (“Department”) grants two Motions for Protective Order filed by CoxCom, Inc. d/b/a Cox Communications (“Cox”) in the above-captioned matter.

#### II. ANALYSIS AND FINDINGS

On September 5, 2014, Cox filed a Motion requesting confidential treatment of channel-specific programming cost information discussed during the confidential portion of the August 12, 2014, rate hearing (“Sept. 5 Motion”).<sup>1</sup> *See* Sept. 5 Motion at 1; *see also* Tr. at 21. On October 31, 2014, Cox filed a Motion requesting confidential treatment of certain subscriber number information provided in response to information requests issued by the Department on October 22, 2014 (“Oct. 31 Motion”).<sup>2</sup> *See* Oct. 31 Motion at 1; *see also* IRs 1-2(f) and 1-2(g). Cox requests that its Sept. 5 and Oct. 31 Motions (together, “Motions”) be granted for a period of five years and that the Department provide Cox an opportunity to request renewals for

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<sup>1</sup> Cox submitted an affidavit from Richard J. Warren, Executive Vice President, Content Negotiations and Strategy and Associate General Counsel of Turner Network Sales, Inc., in support of its Sept. 5 Motion attesting to the confidential nature of the channel programming cost information. Citations to this affidavit are to “Warren Aff.”

<sup>2</sup> Cox submitted an affidavit from Robert J. Howley, Senior Corporate Director in Law & Policy, Cox Communications, in support of its Oct. 31 Motion attesting to the confidential nature of the subscribership information. Citations to this affidavit are to “Howley Aff.”

confidential treatment upon expiration of the initial five-year period. *See* Sept. 5 Motion at 7-8; Oct. 31 Motion at 5-6. The Department grants the Motions, for the reasons discussed below.<sup>3</sup>

The FCC’s cable rate regulations permit franchising authorities to “require the production of proprietary information to make a rate determination” in cases where cable operators have submitted initial rates or have proposed rate increases.<sup>4</sup> *See* 47 C.F.R. § 76.938. Federal regulations also state that “[p]ublic access to such proprietary information shall be governed by applicable state and local law.” *Id.* In turn, the Department “is the certified ‘franchising authority’ for regulating basic service tier rates and associated equipment costs in Massachusetts.” 207 C.M.R. § 6.02; *see also* G.L. c. 166A, § 15.

Under state law, information filed with the Department may be protected from public disclosure, subject to certain conditions:

[T]he [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25C, § 5.

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<sup>3</sup> Cox also requests that the Department include safeguards against public disclosure of the information by explaining how the Department maintains the confidentiality of information granted protection and by providing notice to Cox of the Department’s determinations with respect to any third-party public records requests deemed confidential by the Department. *See* Sept. 5 Motion at 7-8; Oct. 31 Motion at 5-6. In response, the Department notes that it maintains this information separately from the public record and only authorized Department staff are permitted access. *See, e.g., Pet. of CoxCom, Inc. d/b/a Cox Commc’ns to establish and adjust the basic serv. tier programming, equip., & installation rates for the Town of Holland, D.T.C. 12-1, Rate Order* (Jan. 25, 2013) (“D.T.C. 12-1 Order”), at 6-7. The Department does not produce information in response to a public records request that it has determined to be subject to confidential treatment unless otherwise directed by the supervisor of records or a court of lawful jurisdiction in accordance with G.L. c. 66, § 10 and 950 C.M.R. §§ 32.00-32.09. *Id.* at 7.

<sup>4</sup> For example, the FCC has suggested that data regarding a cable operator’s incurred costs, while potentially proprietary, are “material and relevant” to a franchising authority’s review of the operator’s rates. *See, e.g., In re: Comcast Cablevision of Dallas, Inc. Order Setting Basic Equip. & Installation Rates in Farmers Branch, TX (TX0624), et al., CSB-A-0698, et al., Order* (rel. Jun. 14, 2004), at ¶¶ 25-26; *In re: TCI of Pa., Inc. Appeal of Local Rate Order of the City of Pittsburgh, Pa., CSB-A-0322, Memorandum Op. & Order* (rel. Jan. 9, 2004), at ¶ 16.

Chapter 25C, § 5 establishes a three-part standard for determining whether, and to what extent, information may be protected from public disclosure. First, the information for which protection is sought must constitute “trade secrets, [or] confidential, competitively sensitive or other proprietary information.” G.L. c. 25C, § 5. Second, the party seeking protection must overcome the statutory presumption that all such information is public information by “proving” the need for its non-disclosure. *Id*; *see also* G.L. c. 66, § 10. Third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. *See* G.L. c. 25C, § 5; *Investig. by the Dep’t of Telecomms. & Energy on its own Mot. into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Mass.’ intrastate retail telecomms. servs. in the Commonw. of Mass.*, D.T.E. 01-31 Phase I, *Interlocutory Order* (Aug. 29, 2001) (“01-31 *Interlocutory Order*”), at 3 (citing G.L. c. 25, § 5D, the predecessor to G.L. c. 25C, §5).

The Department grants the Motions because they are consistent with applicable law and Department precedent, as discussed below.

a. *September 5 Motion*

As noted above, before the Department can grant confidential treatment to channel-specific programming cost information, it must first determine that it is confidential and competitively sensitive. G.L. c. 25C, § 5. Cox states that “[t]his information is among Cox’s and the programmers’ most highly confidential information.” Sept. 5 Motion at 4; *see also* Warren Aff. ¶ 5. Cox states that the payments are contained in confidential programming agreements. Sept. 5 Motion at 4; *see also* Warren Aff. ¶¶ 4-6. Cox claims that disclosure of this information would cause significant competitive harm to the Company because the information

could be used by competitors in fashioning marketing and pricing plans. Motion at 5-6; Warren Aff. ¶¶ 7-9.

The Department finds that the disclosure of Cox's channel-specific programming cost information could expose Cox to competitive disadvantage by potentially enabling Cox's competitors to formulate competing marketing strategies and pricing offers. This finding is consistent with Department precedent for granting confidential treatment to programming cost information in other dockets. *See, e.g., D.T.C. 12-1 Order at 2-7; Pet. of Time Warner Cable for Review of FCC Form 1240 and Form 1205 for the Great Barrington, North Adams, and Pittsfield Systems, D.T.C. 11-15, Rate Order (Oct. 31, 2012), at 8-13; Review by the Cable Television Div. of the Dep't of Telecomms. & Energy of Fed. Comm'ns Comm'n Forms 1240 & 1205 filed by Time Warner Cable, Inc., C.T.V. 04-05 Phase II, Rate Order (Nov. 30, 2005), at 7* (channel operating cost information, including programming expenses, deemed competitively sensitive).

The second part of G.L. c. 25C, § 5, directs the Department to treat information as public unless the need for protection is proven. G.L. c. 25C, § 5. Cox asserts that it takes significant measures to protect the confidentiality of its programming cost information. *See* Sept. 5 Motion at 4-5. Specifically, Cox maintains that the information is not generally available within the Company, and that only those employees that need to know the information have access. *Id.* at 4. Richard Warren attests that the entity he represents and which provides programming services to Cox subscribers under agreement with Cox takes similar measures. *See* Warren Aff. ¶¶ 5, 11-12. The Department determines that Cox has met its burden under G.L. c. 25C, § 5, of proving that confidential treatment is warranted because of the restrictions in place to protect the information. *See* 01-31 *Interlocutory Order* at 9 (acknowledging the provider's extensive

measures taken to protect the information when made available to non-employees and employees alike).

Finally, G.L. c. 25C, § 5, directs the Department to protect only so much of the confidential material for which the party seeking protection has established a need for. Since programming costs change over time, and because stale programming costs are not competitively relevant, the Department has typically granted confidential treatment to programming costs for limited periods of time. *See, e.g., D.T.C. 12-1 Order* at 6 (granting confidential treatment for channel-by-channel programming costs for a period of five years and affording the provider an opportunity to renew its request for confidential treatment at the end of the period); *Review by the Dep't of Telecomms. & Cable of Fed. Commc'ns Comm'n Forms 1240 & 1205 filed by Cox Com, Inc. d/b/a Cox Commc'ns New England*, D.T.C. 07-10, *Hearing Officer Ruling* (May 30, 2008), at 5-6 (same). Here, Cox requests confidential treatment of its per-channel program cost information for five years. Sept. 5 Motion at 7-8. Cox asserts that this five-year period keeps with past Department precedent, and is appropriate because of the long-term relationships that exist between Cox and its programmers. *Id.*

The Department finds that a five-year period is reasonable, and sufficiently narrowly tailored to satisfy the requirements of G.L. c. 25C, § 5. Accordingly, the Department grants confidential treatment to the per channel program cost information provided by Cox for a period of five years from the date of this Order. The Department further affords Cox an opportunity to renew its request for confidential treatment at the end of that five-year period based upon a showing of need for continuing protection. The Department leaves to Cox the obligation to calendar the expiration of this time period and move for an extension of confidential treatment, if necessary, prior to the expiration of the initial five-year period.

b. *October 31 Motion*

Under G.L. c. 25C, § 5, the Department must first examine whether the specific subscribership numbers reported by Cox through its IR responses are confidential and competitively sensitive information. G.L. c. 25C, § 5. Cox states that it “treats such information as highly confidential and competitively sensitive.” Oct. 31 Motion at 3; *see also* Howley Aff. ¶¶ 5-7. Cox claims that disclosure of this information would cause significant competitive harm to the Company because the information could be used by competitors in fashioning marketing and pricing plans. Motion at 4; Howley Aff. ¶¶ 8-10.

The Department agrees that disclosure of Cox’s granular subscribership information could expose Cox to competitive disadvantage by potentially enabling Cox’s competitors to formulate competing marketing strategies and pricing offers. This finding is consistent with Department precedent for granting confidential treatment to certain subscribership information in other dockets.<sup>5</sup> *See, e.g., Pet. of Budget PrePay, Inc. for Limited Designation as a Lifeline-only Eligible Telecomms. Carrier*, D.T.C. 11-12, *Hearing Officer Ruling* (Dec. 19, 2012) (“D.T.C. 11-12 *Ruling*”), at 10-11 (granting confidential treatment to non-Lifeline state-level subscribership numbers).

The second part of G.L. c. 25C, § 5, directs the Department to treat information as public unless the need for protection is proven. G.L. c. 25C, § 5. Cox asserts that it takes significant measures to protect the confidentiality of its granular subscribership information. *See* Oct. 31 Motion at 3-4. Specifically, Cox maintains that the information is not generally available within

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<sup>5</sup> The Department notes that it has denied requests for confidential treatment of municipal-level cable subscribership numbers otherwise reported to the Department, in part, because those numbers could be easily acquired or duplicated by others. *See Annual Report of Verizon New England Inc. of Complaints Received Regarding FiOS TV Service: MA Form 500 Complaint Report*, D.T.C., *Ruling on Motions for Confid. Treatment Filed by Verizon New England, Inc.* (rel. June 7, 2007), at 8-9, 13-14. The instant case can be distinguished because, here, Cox requested confidential treatment for more granular, municipal-level subscribership numbers broken down by service tier in Holland and for the number of new Holland customers enrolled by Cox for separate calendar years. *See* Oct. 31 Motion at 1; *see also* IRs 1-2(f) and 1-2(g).

the Company, and that only those employees that need to know the information have access. *Id.*; Howley Aff. ¶¶ 5-6. Cox also specifies that this information cannot be readily duplicated by third parties. Howley Aff. ¶ 8. The Department determines that Cox has met its burden under G.L. c. 25C, § 5, of proving that confidential treatment is warranted because of the restrictions in place to protect the information. *See* 01-31 *Interlocutory Order* at 9 (acknowledging the provider's extensive measures taken to protect the information when made available to non-employees and employees alike); D.T.C. 11-12 *Ruling* (noting that the particular subscribership information was not publicly ascertainable).

Finally, G.L. c. 25C, § 5, requires the Department to protect only so much of the confidential material for which the party seeking protection has established a need for. Here, Cox requests confidential treatment of its granular subscribership information for five years. Oct. 31 Motion at 5-6. Cox asserts that this five-year period keeps with past Department precedent. *Id.*

The Department finds that a five-year period is reasonable, and sufficiently narrowly tailored to satisfy the requirements of G.L. c. 25C, § 5. Accordingly, the Department grants confidential treatment to the granular subscribership information in IRs 1-2(f) and 1-2(g) for a period of five years from the date of this Ruling. The Department further affords Cox an opportunity to renew its request for confidential treatment at the end of that five-year period based upon a showing of need for continuing protection. The Department leaves to Cox the obligation to calendar the expiration of this time period and move for an extension of confidential treatment, if necessary, prior to the expiration of the initial five-year period.

### III. RULING

For the reasons discussed above, the Department hereby:

GRANTS: the Motions for Protective Treatment submitted on September 5, 2014, and October 31, 2014, as discussed herein, for a period of five (5) years from the date of this Ruling.

A handwritten signature in blue ink, appearing to read 'KDP', with a long horizontal stroke extending to the right.

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Kerri DeYoung Phillips  
Hearing Officer

### NOTICE OF RIGHT TO APPEAL

Under the provisions of G.L. c. 30A, § 11(8), any aggrieved party may appeal this Ruling to the Commissioner by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. A written response to any appeal must be filed within two (2) days of the appeal.